SUPREME COURT, U. S. No. 149

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IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, — Tenn. —, 410 SW 2d 881, was entered on November 14, 1966. The opinion is reproduced in the Joint Appendix (p. 41). The opinion on Petition to Rehear (— Tenn. —, 410 SW 2d at 885) was entered on February 10, 1967, and is reprinted in the Joint Appendix at p. 47.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on November 14, 1966. A timely petition for rehearing was filed, and was denied on February 10, 1967. Certiorari was granted on October 9, 1967. The jurisdiction of this Court is founded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Was the following described search and seizure conducted in contravention of petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States:

> Petitioners were apprehended on an open highway and arrested for reckless driving. They, and their car, were taken to the county jail. While petitioners were detained inside the jail on the reckless driving charge, police officers, without a warrant, went outside, searched the car, and found and seized a gun located beneath the front seat.

2. Does the introduction of materials obtained by an unconstitutional search and seizure into evidence in a State court trial for criminal contempt contravene the Fourteenth Amendment to the Constitution of the United States?

3. Is a defendant in a State court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, where the conduct alleged as contempt (firing a rifle into an occupied house) is not petty or trivial but is a felony under the law of the State and is punishable by imprisonment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States:

Amendment IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Amendment XIV| "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 23, Tennessee Code Annotated

Section 902. Scope of power—The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

> (3) "* * * The wilful disobedience or resistance of any . . . party . . . or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

Section 903. Punishment—The punishment for contempt may be by fine, or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days . . ."

Title 39, Tennessee Code Annotated:

Section 601. "Assault with deadly weapon—Penalty.—If a person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two (2) years nor more than ten (10) years."

Section 603. "Assault with intent to commit felony—Attempt to commit felony—Penalty.—If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment

in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, by punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)."

Section 613. "Shooting or throwing missile calculated to produce death or bodily harm—Penalty.—Any person who wantonly or maliciously either shoots, or throws any missile calculated to produce death or great bodily harm, at or into any dwelling or any other house which is being used or occupied . . . shall be declared guilty of a felony, and, upon conviction, shall undergo confinement in the penitentiary for a period not less than one (1) year nor more than five years."

STATEMENT OF THE CASE

The employees of Taylor Implement Manufacturing Company, Inc., in Athens, McMinn County, Tennessee, chose the United Steelworkers of America, AFL-CIO, as their collective bargaining representative. The Union was certified by the National Labor Relations Board on September 20, 1965

Negotiations for a contract were unavailing and a legal strike began on January 12, 1966. Petitioners were employees who participated in the strike.

The Company sought and obtained a state court injunction, from the Chancellor of the McMinn County Equity Court, which enjoined the Union and its striking members:

> "(c) From inflicting harm or damage upon the person or property of Complainant's employees, customers, visitors, or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;" (J.A. 1-2).

On February 25, 1966, a shot was fired from a 1960

Dodge automobile into the home of a nonstriking employee who lived in a neighboring county, Monroe County, about 25 miles from the struck plant (J.A. 3). McMinn County police received a report on their car radio that the shooting had occurred, and that the automobile involved was an "old make model car" (J.A. 27).

Shortly thereafter, McMinn County police observed "kinda an old model car", with its right tail-light out, speeding down a highway (J.A. 28). They stopped the car, observed a bullet-hole in the trunk, and arrested the occupants (petitioners) for reckless driving (J.A. 28-30). Petitioners were taken to the county jail (J.A. 30), and the car —owned by petitioner McKinney — was towed to and parked outside the county jail (J.A. 17). While petitioners were detained inside the jail on the reckless driving charge, and after McKinney had announced that he was going to leave his car (J.A. 17), police officers, without obtaining a warrant, went outside and searched the car (J.A. 30). Their search uncovered an air rifle and ammunition (J.A. 30).

Petitioners were never criminally tried for the shooting in Monroe County. However, on March 14, 1966, the Company filed a "Petition for Attachment for Contempt" in the McMinn County Equity Court, alleging that petitioners had fired the shot, and that their doing so violated the injunction against "inflicting harm or damage upon the persons or property of Complainant's employees." More specifically, the petition alleged:

> "On or about February 25, 1966, at approximately 11 p.m. while Lloyd Duckett, a nonstriking employee of the complainant, was at his home located in Monroe County, Tennessee, along with four members of his family, an automobile drove to his premises from which a shot was fired into his home. Thereupon the fleeing car in question was pursued, identified, and caught. It was found that the three occupants of the car were

John Blackwell and the defendants Wayne Dyke and Ed McKinney, all three of whom are striking employees of the complainant and members of the defendant Union. The said Wayne Dyke is the elected president of the local group of the defendant Union. A rifle of the type which fires a projectile of the sort found at the Duckett home was discovered in the car at the time of the apprehension and arrest of the said three striking employees." (J.A. 3.)

Defendants pleaded not guilty, and demanded a jury trial (J.A. 5, 8). The Chancellor refused to provide them a jury trial (J.A. 8). They were tried by the Chancellor on March 22, 1966.

The only evidence linking defendants to the shooting in the adjoining county was the evidence obtained by searching the car. Deputy Sheriff Powers testified that defendants were arrested for reckless driving (J.A. 30); that they were brought to the county jail (J.A. 30); and that while there detained their automobile was searched and the evidence uncovered:

"A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

"MR. TAYLOR: We object to that.

"THE COURT: I overrule.

"MR. TAYLOR: Note our exception.

"Q. (By Mr. Carter) Go ahead.

"A. And——

"THE COURT: (interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

"Q. (By Mr. Carter) Go ahead, Mr. Powers.

"A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun" (J.A. 30).

The defendants were convicted and given the maximum punishment authorized, 10 days in jail and a $50.00 fine, Tennessee Code Annotated, Title 23, Section 903. (J.A. 4).

Defendants appealed to the Supreme Court of Tennessee, on the grounds, *inter alia,* that the denial of jury trial and the admission of the materials obtained from the search of the car violated their rights under the Constitution of the United States (J.A. 39-40).

On November 14, 1966, the Supreme Court of Tennessee denied the appeal. On the jury trial issue, the Court merely recited that the federal Constitution does not require a jury trial (J.A. 44). On the search and seizure issue, the Court found the search lawful:

> "Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reasonable limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful con-

duct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. (J.A. 45).

Defendants petitioned for rehearing, again asserting that on both issues their federal Constitutional rights had been denied. The petition for rehearing was denied on February 10, 1967 (J.A. 47).

Defendants' federal claims were asserted at all stages of the state proceedings. See, e.g. J.A. 8, 30, 32, 39-40.

SUMMARY OF ARGUMENT

I. THE SEARCH OF THE CAR WITHOUT A WARRANT CONTRAVENED THE FOURTH AND FOURTEENTH AMENDMENTS

A. As this Court has often acknowledged, its decisions as to when a search without warrant is "reasonable" are in irreconcilable conflict. It is imperative that the Court now enunciate a viable rule of general application, for the existing turmoil visits incalculable harm upon both law enforcement and the citizenry.

In large part, the existing confusion has been caused by a two-decade debate between competing conceptions of the Fourth Amendment. One view, typified by *McDonald v. U.S.*, 335 U.S. 451 (1948), is that a search without warrant is never permitted except where the "exigencies of the situation" preclude the delay necessary to obtain a warrant. The other view, typified by *U.S. v. Rabinowitz*, 339 U.S. 56 (1950), is that the reasonableness of a search without warrant must be judged on the facts and circumstances of each case, and the mere fact that there is time to obtain a warrant does not automatically invalidate a search without one. Until 1967, this split affected the Court's holdings in only one area: the extent to which a warrantless search might be conducted "incident to an arrest." However, with

Cooper v. *California*, 386 U.S. 58 (1967), holding that it is "reasonable" to search a car impounded as evidence in a forfeiture proceeding, the debate has taken on a new dimension and importance, for the *Rabinowitz* view has now been expanded for the first time into new fields.

We believe the *Rabinowitz* approach is inherently destructive of the purposes the Fourth Amendment is intended to serve. By making "reasonableness" turn on the facts of each case, *Rabinowitz* virtually guarantees that police officers will be incapable of understanding the limits of their authority, and that they will, therefore, engage in unlawful searches. (The repeated splits within this Court over what is "reasonable" prove the unmanageability of the *Rabinowitz test*). By contrast, the *McDonald* test is one which police officers can understand and apply. In each case, the officer need only ask: "Do I have time to obtain a warrant?"

Moreover, the *McDonald* rule more accurately fulfills the essential purpose of the Fourth Amendment: interposition of a judicial officer between the policeman and the citizen's privacy. It assures an independent judicial appraisal in all cases where considerations of time do not preclude it. And it does so with no harm to the interests of law enforcement, for it is precisely where those interests preclude obtaining a warrant that *McDonald* authorizes a warrantless search. We urge, accordingly, that this Court declare *McDonald* the test of reasonableness for all warrantless searches.

If *McDonald* is the governing rule, the search here was unlawful, for "the exigencies of the situation" did not preclude obtaining a warrant. Petitioners were under custody inside the county jail; their car had been towed and parked outside the jail; and petitioner McKinney—the car's owner—had announced that he was going to leave it. There was, therefore, ample time to secure a warrant.

B. Even if this Court adheres to *Rabinowitz*, and therefore determines "reasonableness" on a case-by-case basis, it

must conclude that the search here was unreasonable. The facts and circumstances here are virtually identical to those in *Preston* v. *U.S.*, 376 U.S. 364 (1964). The invalidation of the search in *Preston* dictates the same result here. Nothing in *Cooper* v. *California, supra,* detracts from the applicability of *Preston* here. As the Court made clear in *Cooper,* its decision was premised on the unique factors—absent in *Preston* and here—that the car had been impounded, subject to forfeiture, as evidence of the very crime for which its owner was arrested. Here, as in *Preston,* the car was not impounded, it was not subject to forfeiture, and it was not evidence of the crime (reckless driving) for which petitioners were arrested.

C. The exclusionary rule applies to criminal contempt proceedings. This Court has already held it applicable to forfeiture proceedings, *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965), on the ground that forfeiture is a "quasi-criminal" proceeding. Criminal contempt is at least a "quasi-criminal" proceeding. *A fortiori,* if the exclusionary rule protects against forfeiture of automobiles, it must protect against forfeiture of liberty.

II. PETITIONERS WERE ENTITLED TO A JURY TRIAL

The denial of a jury trial to petitioners in the state court criminal contempt proceeding contravened the Sixth Amendment to the Constitution as applied to the States by the Fourteenth Amendment. Irrespective of whether all criminal contempts constitute "criminal prosecutions" within the meaning of the Sixth Amendment, it is self-evident that the instant proceeding in which the alleged act of contempt itself constituted a serious felony under state law (shooting bullets into a home with intent to kill or inflict bodily harm) was tantamount to a criminal prosecution and, therefore, petitioners were entitled to a jury trial. Cf. *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966). Just as the

question whether a defendant accused of a crime is entitled to a jury trial depends primarily upon the nature of the offense where the potential sentence is small (*District of Columbia* v. *Colts,* 282 U.S. 63 (1930); *Callan* v. *Wilson,* 127 U.S. 540 (1888)), so too the same test should apply to criminal contempt proceedings.

Further, since the right to trial by jury in any such criminal prosecution is one of the fundamental guarantees contained in the Bill of Rights it is likewise obligatory upon the States under the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

ARGUMENT

I.

THE SEARCH OF THE CAR WITHOUT A WARRANT CONTRAVENED THE FOURTH AND FOURTEENTH AMENDMENTS.

The search of the automobile in this case was conducted in circumstances indistinguishable from those in *Preston* v. *U.S.,* 376 U.S. 364 (1964) and we show in Part B herein that the invalidation of the search in *Preston* requires a similar ruling here.

We believe, however, that this case should not be decided on so narrow a ground. As we show in Part A, it is imperative that this Court enunciate a viable standard for measuring the validity of all warrantless searches. This case presents an appropriate opportunity to do so.

A. A Search Without A Warrant is Valid Only Where "The Exigencies of the Situation" Make it Impracticable to Obtain a Warrant

1. *The Need for a Viable Rule of General Application*

For two decades, the standards governing the "reasonableness" of searches without warrants have been in a state

of turmoil. It is imperative—for the interests of law enforcement and the citizenry alike—that a clear standard of general application be adopted by this Court.

That turmoil exists has been readily acknowledged by this Court. "The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well known, provoked a strong and fluctuating difference of view on the Court," *Abel* v. *U.S.*, 362 U.S. 217, 235 (1960). "The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth." *Chapman* v. *U.S.*, 365 U.S. 610, 618 (concurring opinion of Mr. Justice Frankfurter). "For some years now the field has been muddy . . ." *Id.* at 622 (dissenting opinion of Mr. Justice Clark). "[A]s to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably." *Irvine* v. *California*, 347 U.S. 128, 134 (1954) (opinion of Mr. Justice Jackson). See also, *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

This confusion visits incalculable harm upon both law enforcement and the citizenry. The dilemma it poses for police officers was stated in *Chapman* v. *U.S.*, *supra*, 365 U.S. at 622-23 (dissenting opinion of Mr. Justice Clark):

> "Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases."

Nor do the problems of law enforcement end with the police officer's decision. If he decides to search without a warrant, the burden then falls upon the prosecutor and the

trial judge to determine whether the articles seized should be proffered and admitted. "Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits." *Chapman* v. *U.S., supra,* 365 U.S. at 618 (concurring opinion of Mr. Justice Frankfurter.).

The principal victim of the confusion, however, is the private citizen whom the Fourth Amendment is intended to protect. So long as the police officer is in doubt, he may err in favor of a warrantless search. When he does, the innocent citizen suffers an injury which cannot be repaired.

> "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke any advance protection . . .
>
> ". . . [A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Brinegar* v. *United States,* 338 U.S. 160, 181, 182 (1949) (dissenting opinion of Mr. Justice Jackson).

Clearly these considerations dictate the adoption of a viable rule of general application, so that police officers

will know the limits of their authority, and citizens will not be subjected to searches ultimately found unlawful but undertaken by police officers who in good faith thought they were permitted.

As we will show herein, the *McDonald* rule—prohibiting warrantless searches except where "the exigencies of the situation" preclude the delay necessary to obtain a warrant, *McDonald* v. *U.S.*, 335 U.S. 451, 455 (1948)—is both an historically accurate embodiment of the central purpose of the Fourth Amendment and a viable rule of general application which would end the existing turmoil. Before proposing solutions, however, we first describe the two sources of the current turmoil.

2. *The Causes of the Present Turmoil*

There are two causes of the confusion which now dominates this area of the law. The first is that, throughout the past two decades, there has been a never-ending clash between two competing conceptions of the Fourth Amendment: what we shall call the *McDonald* view and the *Rabinowitz* view. The second is that, to the extent the *Rabinowitz* view has been followed, it has proven unmanageable in practice. We discuss each of these causes herein.

a. *Two Competing Conceptions of the Fourth Amendment.*

This Court has been rent asunder by a debate over the fundamental question of when a warrantless search is "reasonable". One school of thought—which we have captioned the *McDonald* view—holds that a search without warrant is "reasonable" only if "the exigencies of the situation" preclude delay. This view, which commanded a majority of the Court in *McDonald, supra; Carroll* v. *U.S.*,

276 U.S. 132 (1925);[1] *Taylor* v. *U.S.*, 286 U.S. 1 (1932);[2] *Trupiano* v. *U.S.*, 334 U.S. 699 (1948);[3] *U. S.* v. *Jeffers*, 342 U.S. 48 (1951);[4] and *Chapman* v. *U.S.*, 365 U.S. 610 (1961),[5] see also *Go-Bart Importing Co.*, 282 U.S. 344, 358 (1931); *Johnson* v. *U.S.* 333 U.S. 10 (1948); *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967), received its fullest exposition in Mr. Justice Frankfurter's dissenting opinion in *U.S.* v. *Rabinowitz*, 339 U.S. 56, 70 (1950):

> "One cannot wrench 'unreasonable searches' from the context and historical content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants, and searches with warrants unrestricted in scope. Both were deemed "unreasonable.' Words must be read with the gloss of experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it

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[1] "In cases where the securing of a warrant is reasonably practicable, it must be used . . ." 267 U.S. at 156.

[2] "[T]he agents had made no effort to obtain a warrant for making a search. They had ample opportunity to do so and to proceed in an orderly way." 286 U.S. at 6.

[3] "It is a cardinal rule that, in seizing goods and articles, agents must secure and use search warrants wherever reasonably practicable. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial process wherever possible." 334 U.S. at 705.

[4] "Over and over again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it.*" 342 U.S. at 48 (emphasis supplied).

[5] "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons . . ." 365 U.S. at 615 (quoting and following *Johnson* v. *U.S.*, 333 U.S. 10, 15 (1948)).

would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."

The contrary view—stated most strongly in the opinion of the Court in *Rabinowitz,* 339 U.S. 56, 65, 63—is that reasonableness for a warrantless search does not depend upon necessity; rather, the courts must determine what is reasonable in all the circumstances, on a case-by-case basis:

"A rule of thumb requiring that a search warrant always be procured wherever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystalized into a *sine qua non* to the reasonableness of a search.

* * *

"What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case . . . Reasonableness is in the first instance for the District Court to determine."

While *Rabinowitz* purported to overrule the "necessity" doctrine (339 U.S. at 66) it is fair to say that in the ensuing 17 years each of the doctrines has at times command-

ed a majority of the Court,[6] and in recent years the Court has shown a growing recognition that the comparative merits of the two theories must ultimately be reassessed.[7]

Rabinowitz left for subsequent case-by-case development the elucidation of what situations—other than those governed by necessity—would justify a warrantless search.

However, for the next 16 years, until *Cooper* v. *California*, 368 U.S. 58 (1967), the only situation in which *Rabinowitz* led to a different result than *McDonald* was with respect to the search "incident to an arrest".

Under the *McDonald* rule, a warrantless search incident to an arrest must be limited, geographically, to the person of the arrestee and the area which he can physically reach. Since the only "exigencies" precluding obtaining a warrant are that the arrested person might obtain a weapon or destroy evidence, the area which may be searched is the area he can reach:

> "Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape . . . and, secondly, to avoid destruction of evidence by the arrested person . . . From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate control." *U.S.* v. *Rabinowitz*,

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[6] For example, in *Chapman* v. *U.S.*, 365 U.S. 610 (1961), the majority applied the "necessity" doctrine, and both the concurring and dissenting opinions viewed this as a repudiation of *Rabinowitz*, 365 U.S. at 618, 623. But in *Cooper* v. *California*, 386 U.S. 58 (1967), a 5-4 majority expressly followed *Rabinowitz*.

[7] See, e.g. *Abel* v. *U.S.*, 362 U.S. 217, 235, 249 (1960) (majority and dissenting opinions); *Stoner* v. *California*, 376 U.S. 483, 487 n. 5 (1964); *Wong Sun v. U.S.*, 371 U.S. 471, 480, n. 8, 497 (1963) (majority and concurring opinions). In recent cases, the Court has gone out of its way to emphasize that its decision in the particular case would be the same under either view, *Stoner, supra*; *Ker* v. *California*, 374 U.S. 23, 41 (1963); *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967).

supra, 339 U.S. 56, 72 (dissenting opinion of Mr. Justice Frankfurter).

The *Rabinowitz* rule, however, recognized a third dimension which, albeit not "necessary", was regarded as "reasonable": the search might extend a certain distance beyond the reach of the arrested person—how far was to become a much-mooted question[8]—in order to uncover the fruits of the crime for which the person was arrested.

This latter factor has no place, of course, under the *McDonald* rule. Judge Learned Hand had so stated in his opinion below in *Rabinowitz:*

> "[If] the reasonableness of search is to depend upon the presence of the party in the premises searched at time of the arrest . . . that would make crucial a circumstance that has no rational relevance to the purposes of the privilege . . .
>
> It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage," *U.S.* v. *Rabinowitz,* 176 F.2d 732, 735 (2d Cir. 1949)

As Mr. Justice Frankfurter made clear, under the *McDonald* rule police officers might *seize* what was in open view in the room, for that involved no invasion of any remaining privacy (339 U.S. at 75), but they might not *search* for what was not visible.[9]

The consequences of the split between the *McDonald* and *Rabinowitz* doctrines escalated enormously in 1967, however, with the 5-4 decision in *Cooper* v. *California,* 386 U.S. 58 (1967). For the first time, an "unnecessary" war-

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[8] E.g., Cf. *Rabinowitz* and *Harris* v. *U.S.,* 331 U.S. 145 (1947) with *Kremen* v. *U.S.,* 353 U.S. 346 (1957).

[9] This distinction was emphasized in *Go-Bart, supra,* and *U.S.* v. *Lefkowitz,* 285 U.S. 452 (1932).

rantless search was allowed in a situation other than incident to an arrest, in this case of a car locked in a police garage. The search was considered "reasonable" because the car was "validly held by officers for use as evidence in a forfeiture proceeding". *Id.* at 62. As might be anticipated, law enforcement officers have already begun to develop additional theories to attract this Court's newly-kindled interest in expanding *Rabinowitz*. Thus, in *Harris* v. *United States,* October Term, 1967, No. 92, the Government argues that it is "reasonable" to search any car which it has lawfully seized.

b. *The Unmanageability of Rabinowitz.*

The second cause of the confusion which has marked this Court's efforts to define the validity of warrantless searches is that *Rabinowitz* has proved to be an unmanageable rule. In those cases in which the Court has sought to apply *Rabinowitz,* it has been called upon in the abstract to define when it is "reasonable" to forego a warrant—with no meaningful guide to govern that determination—and the result has been inevitable splits over what is "reasonable" and fluctuating decisions on similar facts. Cf., e.g., *Harris* v. *U.S.,* 331 U.S. 145 (1947) (validating a five-hour search of a three-room apartment) with *Kremen* v. *U.S.,* 353 U.S. 346 (1957) (invalidating a one-and-one-half hour search of a cabin) and *U.S.* v. *Rabinowitz,* 339 U.S. at 64 (validating the search, in part, because "the room was small" and "the search did not extend beyond the room used for unlawful purposes"). See also *Abel* v. *U.S.,* 362 U.S. 217 (1960) and *Cooper* v. *California,* 386 U.S. 58 (1967) in which the Court was divided over what was "reasonable".

3. *The Rabinowitz Rule Is Unworkable*

We submit that the *Rabinowitz* rule, as revitalized and extended in *Cooper,* unless checked will sap the Fourth Amendment of all meaning. For it has created a situation

in which it is inconceivable that police officers can determine the limits of their authority, and has cast this Court upon a sea of endless battles over what is "reasonable" in the abstract.

The inherent unworkability of *Rabinowitz* is implicit in the very recitation with which it was born. "What is a reasonable search is not to be determined by any fixed formula". 339 U.S. at 63. If there is no fixed formula, how are tens of thousands of police officers to know when they need a warrant? "[R]egrettably, . . . we have no ready litmus-paper test". *Ibid.* Nor do the police. "The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." *Ibid.* How is a police officer to apply so elusive a test? "Reasonableness is in the first instance for the District Court to determine." *Ibid.* By then it is too late, for the police officer has already made the only meaningful determination; he has already searched, and the damage is done.

It may well be that the Court in *Rabinowitz* thought the standard of "reasonableness" would become clear in ensuing litigation. As we have already noted, the past 17 years have not borne out that expectation. In his dissent in *Rabinowitz,* Mr. Justice Frankfurter posed some questions about the scope of the "reasonablesness" test as applied to searches incident to arrest:

> "Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a partition?" (339 U.S. at 79).

These types of questions must be answered *in practice* by police officers every day. We respectfully submit, however, that 17 years after *Rabinowitz* no constitutional scholar could safely predict the answer to any of them.

In light of *Cooper,* similar questions will now abound with respect to the search of cars seized by the police. A unanimous state intermediate court, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483, thought the search in *Cooper* was "unreasonable" in light of this Court's decision in *Preston,* 376 U.S. 364 (1964), only to learn that a majority of this Court believed otherwise. Can police officers be expected to do better? Can they be trusted to draw the line between *Preston* and *Cooper?* What other areas, as yet untapped, may join searches incident to arrest and forfeitable cars as appropriate occasions for warrantless searches? See, e.g., the Government's position in *Harris* v. *U.S.,* No. 92, this Term.

The practical consequences of confusion are today, of course, fifty times greater than when *Rabinowitz* was decided, for in the interim this Court has declared that the exclusionary rule is applicable to the states, *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and that the same constitutional standards governing federal searches will be applied to state searches, *Ker* v. *California,* 374 U.S. 23 (1963). See also, *Id.* at 45 (concurring opinion of Mr. Justice Harlan).

4. *The McDonald Rule Is Workable*

The *McDonald* rule, unlike *Rabinowitz,* provides a standard which police officers can comprehend and apply. The question, in every case, is whether "the exigencies of the situation" preclude the delay required to obtain a warrant. The officer need consider only: "Do I have time to get a warrant?" While there will be occasional cases in which the particular facts make this debatable, in the vast majority of cases the answer will be clear. In *Carroll* v. *U.S.,* 267 U.S. 132 (1924), at a time when the *McDonald* rule was indisputably the law ("In cases where the securing of a warrant is reasonably practicable, it must be used . . ."

Id. at 156), the Court commended the rule as "a wise one, because it . . . is easily applied and understood, and is uniform." *Id.* at 159. And even *Rabinowitz*, while purporting to announce the rule's demise, acknowledged: "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration." 339 U.S. at 65.

Nor would adoption of the *McDonald* rule entail any sacrifice in the effectiveness of law enforcement. By its very definition, the *McDonald* rule permits a warrantless search whenever the true demands of law enforcement require. To be sure, in other circumstances it may cause "inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate", but "These are never very convincing reasons" for foregoing a warrant. *Chapman* v. *U.S.*, 365 U.S. 610, 615 (1961).

5. *The McDonald Rule Is the Correct Interpretation of the Fourth Amendment*

Over and over again, this Court has recited that one of the "essential purposes" of the Fourth Amendment was to place the judiciary between the police officer and the citizen's privacy. *Jones* v. *U.S.*, 357 U.S. 493, 498 (1958):

> "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy . . . That purpose is realized . . . by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justifies the issuance of a search warrant".

See also, *McDonald, supra,* 335 U.S. at 455; *Warden* v. *Hayden,* 387 U.S. 294, 301 (1967); *See* v. *City of Seattle,* 387 U.S. 541, 546 (1967); *Berger* v. *New York,* 388 U.S. 41, 54 (1967).

In this way, it was assured that the decision to search would be made dispassionately, and not by the police officer whose interest in obtaining evidence might outweigh his respect for the constitutional right of privacy. *Johnson* v. *U.S.*, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime".

The framers of the Bill of Rights recognized, of course, that in some circumstances warrantless searches would be necessary, but it was only in such situations—where there is a *need* to bypass the judiciary—that the Fourth Amendment intended a warrantless search to be "reasonable". *U.S.* v. *Jeffers*, 342 U.S. 48, 51 (1951):

> "Over and over again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it.* [Citing *McDonald*]. In so doing the Amendment does not place an unduly oppressive weight on law enforcers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended . . . Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands . . ." (Emphasis supplied).

See also, *U.S.* v. *Rabinowitz*, 339 U.S. 56, 70 (1950) (dissenting opinion of Mr. Justice Frankfurter).

The *McDonald* rule—that warrantless searches are forbidden except where "the exigencies of the situation" preclude delay—fully comports with this constitutional purpose. It interposes an impartial magistrate in all cases but those where an overriding interest of law enforcement makes prompt search necessary.

The *Rabinowitz* rule, by contrast, is unfaithful to the constitutional purpose. It leaves room for police zeal, without judicial intervention, in cases where that sacrifice of protection is uncalled for and unnecessary. It "makes a mockery of the Fourth Amendment". *U.S.* v. *Rabinowitz*, 339 U.S. at 70 (dissenting opinion of Mr. Justice Frankfurter).

The *Rabinowitz* Court thought its conclusion required because broad searches incident to arrest had "always" been permitted. 339 U.S. at 60. As Mr. Justice Frankfurter showed extensively in dissent, however, *Id.* at 72-79, the Court's view of history was incorrect. We shall only briefly summarize his demonstration. Historically, the right to search incident to an arrest had been "strictly confined to the necessities of the situation, i.e. the search of the person and those immediate physical surroundings which may fairly be deemed to be an extension of his person". *Id.* at 72-73. "Of course in this field, as in others, opinions sometimes use language not with fastidious precision". *Id.* at 72. The *Rabinowitz* Court was mistakenly relying on such "loose language" in concluding that there were antecedent roots for its decision. (*Id.* at 75):

> "These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum, and finally elevated to a decision. This progressive distortion is due to an uncritical confusion of (1) the right to search the person arrested and articles in his immediate physical con-

trol and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged right to search the place of arrest. It is necessary in this connection to distinguish clearly between prohibited searches and improper seizures. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure when found by legal means . . . .Thus the seizure of items properly subject to seizure because in open view at the time of arrest does not carry with it the right to search for such items".

Mr. Justice Frankfurter concluded, *Id.* at 79:

> "The short of it is that the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it."[10]

Thus, the result of *Rabinowitz*—which flies in the face of the purpose of the Fourth Amendment—cannot be justified as an historic exemption intended to be preserved by the framers of the Bill of Rights. With all respect, we suggest

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[10] Mr. Justice Frankfurter noted that in two prior cases the Court had slipped into the same error as in *Rabinowitz*. The first was *Marron* v. *U.S.*, 275 U.S. 192 (1927), but this error was quickly repaired in *Go-Bart Co.* v. *U.S.*, 282 U.S. 344 (1931) and *U.S.* v. *Lefkowitz*, 285 U.S. 452 (1932). The second was *Harris* v. *U.S.* 331 U.S. 145, 150 (1947), where the Court stated that "Search and seizure incident to lawful arrest is a practice of ancient origin". As Mr. Justice Frankfurter explained:

> "Literally, this is true: the right to search the person arrested and to seize visible instruments of crime has a good legal title. But judicial history cannot be avouched if this statement is meant to cover the right to search the place of arrest. Such a claim can only be made by sliding from a search for things in his 'possession' or 'in his immediate control', without regard to the treacherous ambiguity of these terms, and then using these phrases, taken out of their original context, so as to include the entire premises". (339 U.S. at 78-79).

that this is even more true of *Cooper* v. *California,* 386 U.S. 58 (1967), for there is not even historical *dictum* to justify approval of an unnecessary warrantless search simply because a car is "validly held by officers for use as evidence in a forfeiture proceeding". *Id.* at 62.

We have shown that *McDonald* is the historically correct interpretation of the Fourth Amendment. We submit, however, that even if this were not so—even if *Rabinowitz* correctly discerned a desire of the framers of the Bill of Rights to leave limited room for unnecessary warrantless searches—*McDonald* would today more closely effectuate the overall purpose of the Fourth Amendment. For 17 years of experience under *Rabinowitz* has shown that, in striving to define that limited area, the Court has left the entire law of search and seizure in confusion. By seeking precision in the grey area, *Rabinowitz* has converted the entire subject into a grey area. The consequence is that the essential purpose of the Fourth Amendment—protection of citizens against lawless searches—has been subjugated to the search for supposed limited exceptions. So long as the governing law remains cloudy, police officers will search under a colorable cloud of legitimacy. It is more important to remove the cloud than to demarcate an area for warrantless searches which are, by definition, unnecessary.

There is another side to the coin, too. The exclusionary rule is designed to deter police officers from engaging in unlawful searches. "[T]he purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it". *Mapp* v. *Ohio,* 367 U.S. 643, 656 (1961).

Rabinowitz, by clouding the field, virtually guarantees that that "deterrent" will be applied against police officers who thought they were obeying the rules. The consequence is that guilty men will go free where, under clearer direc-

tion from this Court, the police officers would have obtained a warrant and preserved the evidence for trial.

For all of the reasons set forth above, this Court should reiterate its declaration in *McDonald* that warrantless searches are prohibited except where the "exigencies of the situation" preclude delay. This announcement would, to be sure, overrule the holdings of three decisions of this Court.[11] But that is true of any clear rule which this Court might announce. Since its decisions "cannot be satisfactorily reconciled", *Abel* v. *U.S.*, 362 U.S. 217, 235 (1960), any ultimate resolution of the existing turmoil requires that some decisions be declared right and others wrong.

6. In the Instant Case, the "Exigencies of the Situation" Did Not Preclude Obtaining a Warrant

In the instant case, it is clear that the "exigencies of the situation" did not preclude obtaining a warrant. At the time the search was conducted, petitioners were inside the county jail, under arrest for reckless driving; the car was parked outside, having been towed there from the scene of the arrest; and petitioner McKinney, the owner of the car, had announced that he was going to leave it (J.A. 17). Accordingly, there was ample time for the police to go before a magistrate and, if able to make a sufficient showing of probable cause, to obtain a warrant for the search.

Accordingly, if *McDonald* states the governing principle for determining the reasonableness of warrantless searches, the search in this case contravened the Fourth and Fourteenth Amendments.

B. *Alternatively, the Search was "Unreasonable" in All the Facts and Circumstances of the Case*

In Part A, we showed that the Court should adopt a general standard for evaluating the validity of warrantless searches: whether the "exigencies of the situation" pre-

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[11] *Harris* v. *U.S.*, 331 U.S. 145 (1947); *U.S.* v. *Rabinowitz*, 339 U.S. 56 (1950); *Cooper* v. *California*, 386 U.S. 58 (1967).

cluded obtaining a warrant. We now show that even if the Court does not accept that position, and instead adheres to the *Rabinowitz* policy of determining "reasonableness" on the basis of the facts and circumstances of each case, it must conclude that the search here was unlawful.

The facts of this case are virtually indistinguishable from *Preston* v. *U.S.*, 376 U.S. 364 (1964), in which a warrantless search was held "unreasonable". In *Preston*, the defendants, while sitting in their parked automobile, were arrested by police officers for vagrancy. The defendants were taken to police headquarters, and their car was taken to the police garage. While defendants were under detention, the police conducted a search of the car without a warrant. This Court held the search to be unconstitutional:

> "The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy. Cf. *United States* v. *Jeffers*, 342 U.S. 48, 51-52, 72 S.Ct. 93, 95, 96, 96 L.Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll* v. *United States*, *supra*, 267 U.S. at 153, 45 S.Ct. at 285, 69 L.Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as the result of the search inadmissible" (376 U.S. at 368).

Here, as in *Preston,* the search was "remote in time [and] place from the arrest". The arrest was made on an open highway; the search was conducted outside the county jail, substantially later. Nor was there "danger that the car would be moved out of the locality or jurisdiction" before a warrant could be obtained: petitioners were under detention, and presumably could have been held until the warrant was obtained; and in any event petitioner McKinney, the owner of the car, had announced that he was going to leave it.

Moreover, neither of the reasons assigned by the Court below could justify the search. There was no need to search "for weapons which might be utilized for resistance or escape" (J.A. 45), for the petitioners were already under detention in the county jail and did not have access to the automobile. Likewise the search could not be justified as "for evidence of the crime for which [defendants were] arrested" (J.A. 45), for they were arrested for reckless driving and there are no articles "which could be the 'fruits' or 'implements' of the crime" of reckless driving. Cf. *Preston* v. *U.S., supra,* 376 U.S. at 368.

Nor does it matter that here, as in *Preston,* a search of the car might arguably have been justified at the time it was initially stopped. *Preston, supra,* 376 U.S. at 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.* See *Stoner* v. *California,* post, p. 483" (Emphasis supplied).

In summary, this case is in all material respects indistinguishable from *Preston,* and the holding that the search there was unreasonable dictates the same result here.

The subsequent decision in *Cooper* v. *California,* 386 U.S. 58 (1967), does not shed doubt on this conclusion.[12] In *Cooper,* this Court upheld the search of a car "validly held by officers for use as evidence in a forfeiture proceeding." *Id.* at 62. In so holding, the Court relied upon special factors present neither in *Preston* nor here:

> "This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the state had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained". (*Id.* at 61).

These considerations are totally inapplicable here. The police were not required by state law to seize the car; it was not seized in connection with the crime for which petitioners were arrested; it was not impounded, and it was not subject to forfeiture; the search was not closely related to the reason petitioners were arrested, i.e., reckless driving.

The distinguishing features of *Preston,* as described by the Court in *Cooper,* are equally present here:

> "Preston was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. It was not suggested that this was done other than for Preston's convenience or that the police had any right to impound the car and keep it from Preston or whomever he might send for it. The

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[12] In Part A, *supra,* we have urged that *Cooper* be overruled. We assume, in Part B, that *Cooper* is to remain the law.

fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car". (*Id.* at 61).

So, here, petitioners were arrested for reckless driving. The police took the car to the station, but it is not suggested that they had any right to impound it, or to keep it from petitioner McKinney—its owner—or whomever he might send for it. The fact of police custody of the car was totally unrelated to the reckless driving charge for which petitioners were arrested. So was the subsequent search.

C. *The Exclusionary Rule Applies to Criminal Contempt Proceedings*

We have shown that, for one reason or another, the search and seizure in this case must be found to have contravened the Fourth and Fourteenth Amendment. We now deal with the reason given by the Chancellor for admitting the evidence: that the exclusionary rule of *Mapp* is not applicable to a criminal contempt proceeding. As he put it, "You may be in good shape in a Criminal Court, but this is not Criminal Court". (J.A. 30).

This rationale was not relied upon by the Tennessee Supreme Court. And it seems clear that the exclusionary rule must apply to criminal contempt proceedings.

In *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965), this Court applied the exclusionary rule to a state court proceeding for forfeiture of a car. This Court characterized the forfeiture as "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize the commission of an offense against the law". 380 U.S. at 700. "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the for-

feiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible". *Id.* at 701. See also *Boyd* v. *U.S.*, 116 U.S. 616, 633-34 (1886).

These considerations apply with even greater force to criminal contempt proceedings. They, too, are at least "quasi-criminal" in character (see, e.g. J.A. 36), and this Court has held that many of the constitutional safeguards of criminal trials are applicable to them (see the discussion *infra,* Part II). The end-result of a criminal contempt trial may, as here, be a jail sentence, and it is inconceivable that the exclusionary rule would protect against the forfeiture of one's car but not the forfeiture of one's liberty. Finally, it is particularly true here (as shown in Part II) that to find contempt the Chancellor had to find that petitioners had engaged in a felony under the state criminal law. For all these reasons, the holding in *Plymouth Sedan* dictates that the exclusionary rule is applicable to criminal contempt proceedings.

It follows that the introduction of the gun and bullets at petitioners' trial contravened the Fourth and Fourteenth Amendments. Since without that evidence there was virtually nothing linking petitioners to the shooting, it is apparent that the error was not harmless (nor did the Tennessee Supreme Court even suggest that it was harmless, cf. *Chapman* v. *California,* 386 U.S. 18 (1967)). Accordingly, the conviction must be reversed.

II.

PETITIONERS WERE ENTITLED TO A JURY TRIAL

The basic question here presented is whether petitioners, who are alleged to have acted in contempt of a court decree by engaging in an act constituting a felony under state criminal law—firing a gun into an occupied house—have

a constitutional right to a jury trial in the criminal contempt proceeding. We show first that the Sixth Amendment creates such a right for federal contempt proceedings. We then show that the Fourteenth Amendment incorporates that right into state contempt proceedings.

A. *The Sixth Amendment Creates A Right to Jury Trial in Criminal Contempt Proceedings Involving Conduct Which Is a Felony Under State Law*

Even the most cursory look at the recent decisions of this Court reflects the wide divergence of views within the Court concerning the constitutionality of summary punishment for criminal contempt. See, for example, *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966); *United States* v. *Barnett,* 376 U.S. 681 (1964); *Green* v. *United States,* 356 U.S. 165 (1958). This much seems clear, however: on the one hand, a majority of the members of the Court continue to reject in conclusionary terms the broad proposition that *all* criminal contempt proceedings are criminal actions within the meaning of Article III [13] and the Sixth Amendment of the Constitution.[14] On the other hand, the Court has been most reluctant to declare that a contemnor would under no circumstances be entitled to a jury trial, and that a Judge could, in his own discretion, impose any jail sentence he desired for contumacious conduct.

Thus, in *Barnett,* the Court, after citing numerous cases that support summary disposition of criminal contempts, stated by way of *dictum:* "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for

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[13] The relevant portion of Article III, Section 2, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."

[14] The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

petty offenses". (376 U.S. 681, 695 at n. 12). These same words were repeated, once again, in *Cheff*, 384 U.S. at 378-379, thus suggesting that the Court might be prepared to find that the Constitution safeguarded the right to trial by jury in at least certain federal criminal contempt proceedings.

The situation is further complicated, however, because the Court in *Cheff* ultimately chose to forego any further examination of the constitutional question and instead relied on its "supervisory power" over the federal courts in concluding that jail sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived (*id.* at 380).[15] In other words, the Court decided *Cheff* without placing express reliance on any constitutional interpretation.

But the Court has now granted certiorari in *Bloom* v. *People of the State of Illinois* (Oct. Term 1967, No. 52, cert. granted April 17, 1967) and the instant case, both involving the right to jury trial in state court criminal contempt proceedings. Quite obviously, this Court's supervisory power over the federal judiciary is of no relevance to these proceedings, and consequently the Court must decide here whether there is a constitutional right to jury trial in criminal contempt proceedings in the unique circumstances where the contumacious conduct itself constitutes a felony under State law and/or the penalty imposed is a substantial period of imprisonment.[16]

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[15] See also *Ford* v. *Boeger*, 362 F.2d 999, 1007 (8th Cir., 1966).

[16] In *Bloom* the questions presented, *inter alia* are: (1) is a defendant in a State Court Trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, particularly where the conduct alleged as contempt is not petty nor trivial, but is a felony under the law of the State?; and, (2) do not *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966) and the Fourteenth Amendment to the Constitution of the United States require jury trials in State Court criminal contempt proceedings where the sentence imposed amounts to two years?

We are not writing on a clean slate; much has already been said concerning the general problem posed by summary criminal contempt proceedings. This has been the subject of extensive analysis by the judiciary, the Congress,[17] and numerous scholarly works by historians and law review commentators.[18] However, even at this late date, fundamental and deep-seated differences of opinion still prevail on many basic questions.

Thus, for example, in *Ex Parte Quirin,* 317 U.S. 1 (1942), the Court stated (*id.* at 40) "Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common-law". But the dispute rages on as to whether the cases decided under the English common-law, and during the early Colonial period, establish sufficient precedent for the principle of summary disposition of criminal contempts so as to support the inference that the founding fathers, in drafting the Constitution, intended to exempt all criminal contempt proceedings from the general requirement of jury trials for criminal prosecutions.[19] And this, in turn, is closely interrelated with the vexing question whether criminal contempt should be

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[17] See discussion infra.

[18] See, for example, Frankfurter & Landis, "The Power to Regulate Contempts", 37 Harv. L. Rev. 1010 (1923); Beale, "Contempt of Court, Criminal and Civil", 21 Harv. L. Rev. 161 (1909); Fox, "The King of Almon", 24 Law Q. Rev. 184 (1880); Fox, "The Summary Process to Punish Contempt", 25 Law Q. Rev. 238, 254 (1909); Fox, "Eccentricities of the Law of Contempt of Court", 36 Law Q. Rev. 394 (1920); Fox, "The Practice in Contempt of Court Cases", 38 Law Q. Rev. 184 (1922); Goldfarb "The Contempt Power" (Columbia University Press, 1963); and 4 Blackstone's *Commentaries.*

[19] Compare, *Cheff* v. *Schnackenberg, supra,* 384 U.S. at 380; *Ex Parte Grossman,* 267 U.S. 87; *Gompers* v. *United States,* 233 U.S. 604, 610-611; and *Green* v. *United States,* 356 U.S. 165, 201 (Black, J. dissenting).

viewed as a criminal prosecution, or rather, as a "sui generis" procedure.[20]

While there is a general tendency to describe criminal contempt as a "sui generis" procedure, this can be misleading. For this Court has long held that many of the protections available to a defendant in a criminal trial are equally applicable to a summary contempt proceeding. See,

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[20] In *Green* v. *United States*, Mr. Justice Black, dissenting, stated as follows (356 U.S. at 202-203) ". . . it seems clear that until at least the late Seventeenth or early Eighteenth Century, the English courts, with the sole exception of the extraordinary and ill-famed Court of Star Chamber, whose arbitrary procedures and gross excesses brought forth many of the safeguards included in our Constitution, neither had nor claimed power to punish contempts committed out of Court by summary process. Fox, 'The History of the Contempt of Court', and Frankfurter and Landis, 'Power to Regulate Contempts', 37 Harv. L. Rev. 1010, 1042-1052; Beale, 'Contempt of Court, Criminal and Civil', 21 Harv. L. Rev. 161. Prior to this period such contempts were tried in the normal and regular course of the criminal law, including trial by jury".

Thereafter, (*id.* 205-206) Mr. Justice Black quotes from the mentioned article by Frankfurter and Landis thusly. ". . . the Clayton Act [providing for jury trial of certain charges of criminal contempt] does nothing new. It is as old as the best traditions of the common law . . .

"Down to the early part of the Eighteenth Century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, i.e., tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court' ,...

"[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process".

Compare, however, the statement contained in the majority opinion of Mr. Justice Harlan in *Green* (*id.* at 185)—". . . it at least seems clear that English practice by the early Eighteenth Century comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside the Court".

These seemingly irreconcilable interpretations of the history of contempt power under the common-law are scattered throughout the *Green* and *Barnett* opinions.

for example, *Gompers* v. *Bucks Stove & Range Company*, 221 U.S. 418, 444 (1911) (proof of guilt beyond a reasonable doubt and freedom from compulsion to testify); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925) (compulsory process and right to assistance of legal counsel). So too, the Court has held that a contemnor in a criminal contempt proceeding is entitled to the benefit of the statute of limitations generally governing crimes (*Gompers* v. *United States*, 233 U.S. 604, 611-612) (1914) and has the right to be considered for a pardon. *Ex Parte Grossman*, 267 U.S. 87, 115, 118 (1925). Thus, while the Court continues to espouse the "sui generis" nature of the criminal contempt procedure, it has nonetheless required that such proceedings be accompanied by many of the fundamental safeguards associated with criminal prosecutions generally.

Suffice it to say, however, at this point in history, a majority of the Court has endorsed the principle that there is no constitutional right to a trial by jury where the criminal contempt consists of either misbehavior in Court[21] or general disobedience of a court decree[22] and the penalty imposed is comparable to that customarily meted out for a petty offense.

The Court need not reexamine this broad proposition to dispose of the instant case.[23] For we believe that the ap-

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[21] Historically, courts have been deemed to have the inherent power to punish for contempts committed in their presence on the theory that such disrespectful acts tend to obstruct or degrade the administration of justice. See, for example: *Ex Parte Terry*, 128 U. S. 289, 302-304 (1888) (misconduct in court room); *Savin, Petitioner*, 131 U. S. 267, 277 (1889) (attempt to bribe witnesses); *Blackmer* v. *United States*, 284 U.S. 421, 440 (1932) (failure to respond to subpoena).

[22] See, for example, *Gompers* v. *Bucks Stove & Range Company*, 221 U.S. 419; *In Re Debs*, 158 U.S. 564 (1895).

[23] It may be argued persuasively that the opposite conclusion is warranted and that the right to trial by jury attaches to all criminal contempts. See dissenting opinion of Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas concurred in *Green* v.

propriate point of departure for the correct resolution of this case is the Court's opinion in *Cheff*. There, four members of the Court — Chief Justice Warren and Justices Clark, Brennan and Fortas—rested their constitutional ruling that the right to a jury trial does not attach to *all* criminal contempt proceedings on the fact that Cheff's contempt proceeding—alleging the failure to comply with a federal court cease and desist order relating to deceptive trade practices—was equivalent to a procedure to prosecute a petty offense. Since the latter has historically been viewed as a narrow and unique class of cases not constituting "Criminal prosecutions" as defined in the Sixth Amendment,[23a] so too was the criminal contempt proceeding initiated against *Cheff*.

We believe the converse of this reasoning dictates the disposition of this case. Where, as here, the criminal contempt proceeding is not the equivalent of a procedure to prosecute a petty offense, but rather carries with it the indicia of a criminal prosecution, then the constitutional right to a jury trial should be vouchsafed. We explain below why this is so.

The act of misconduct, upon which the State Court based its contempt order, was itself a felony—shooting bullets into the house of a person calculated to produce death or bodily harm. Not only was such conduct a statutory felony under Tennessee law,[24] but it was an indictable offense at common law as well. Under any standard of reasonableness, then, a proceeding designed to punish individuals for engaging in felonious conduct of a serious anti-social nature

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U.S., supra; see also, the dissent of Mr. Justice Black in *Barnett;* and the dissent of Mr. Justice Douglas in *Cheff*.

[23a] See, for example, *Callan* v. *Wilson,* 127 U.S. 540, 557 (1888); *Natal* v. *Louisiana,* 139 U.S. 621 (1891); *Lawton* v. *Steele,* 152 U.S. 133 (1894); *Schick* v. *U.S.,* 195 U.S. 54, 68-72 (1904); *District of Columbia* v. *Colts,* 282 U.S. 63, 72-73 (1930).

[24] Title 39, Tennessee Code Annotated, Sections 601, 603, 613.

cannot be deemed to be the equivalent of a prosecution for a petty offense.

It may be appropriate to view the more traditional contempt proceedings—for misbehavior in court and general disobedience of a court decree—as "sui generis" rather than criminal prosecutions under the Sixth Amendment. But this is plainly not so where, as here, the alleged act of contempt is itself a felony. At least in these circumstances, the words of Mr. Justice Holmes (*Gompers* v. *U.S.*, 233 U.S. 604, 610-611) ring true: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N.S. p. 147 (1885), and that, at least in England, it seems that they still may be and preferably are tried in that way . . ." Accord: *Michaelson* v. *United States*, 266 U.S. 42, 66 (1924); *U.S.* v. *Barnett*, *supra*, 376 U.S. at 755 (Goldberg, J., dissenting): *Green* v. *United States*, *supra*, 356 U.S. at 201 (Black, J. dissenting).

To conclude that petitioners were not involved in a "criminal" prosecution would be totally unwarranted here. The decision to hold the petitioners in criminal contempt only came after the Court had heard testimony presented both in support and opposition to the charge that certain individuals had fired bullets from a rifle into the home of a non-striker. The Court, thus, for all intents and purposes performed the exact function which a jury normally performs in a major criminal case—to wit, passing on the question whether the defendants were guilty or innocent of a felony. Indeed, the Court's own evaluation of its function is revealing. Judge Woodlee stated (R. 166): ". . . . [O]f course, the Court is the jury in this case, but to my mind—I am naturally, I would be more disturbed about the con-

sequences of a criminal trial in Monroe County than in this Court because of the comparative difference in penalties in the event of guilt." From the foregoing it would seem to follow, virtually by definition, that this proceeding was not the equivalent of a prosecution for a petty offense.

The precise distinction discussed above—i.e., between traditional contempts and those which themselves constitute independent, serious felonious acts—has been drawn by the Congress, both in the general contempt statutes and in one law relating specifically to contempts arising out of labor disputes.

Thus, 18 U.S.C. Sec. 3691 provides, in relevant part:

> "Whenever a contempt charge shall consist of willful disobedience of any lawful writ, process, order, rule, decree, or command of any District Court of the United States . . . *and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress or under the laws of any State* in which it was done or omitted, *the accused, upon demand therefor, shall be entitled to trial by jury,* which shall conform as near as may be to the practice in other criminal cases.
>
> "This section shall not apply to contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice . . ." (Emphasis added.)

See also 18 U.S.C. Sec. 402, 62 Stat. 701 (1949); and Rule 42(b) of the Federal Rules of Criminal Procedure.[25]

So too, the Norris-LaGuardia Act, 18 U.S.C. Sec. 3692, provides, in relevant part, as follows:

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[25] Further provisions for trial by jury in specific criminal contempt proceedings are contained in the Civil Rights Act of 1957 (42 U.S.C. Sec. 1995, 71 Stat. 638), and the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. Sec. 528, 73 Stat. 541).

> "In all cases of contempt arising under the Laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the contempt shall have been committed. This Section shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice, nor to the misbehaviour, misconduct, or disobedience of any officer of the Court in respect to the writs, orders or process of the Court."

To be sure, under Tennessee Law a ten-day imprisonment is the maximum sentence which a Court can impose for criminal contempt.[26] This thus presents the incongruous picture of a Court punishing a serious felonious act in the name of "contempt" by imposing a relatively minor jail sentence.[27] Obviously, the position we assert would be even less assailable if *both* the nature of the offense and the punishment which could be imposed reflected the gravity of the

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[26] See, Title 23, Tennessee Code Annotated, Sec. 903.

[27] Cf., Justice Goldberg's dissent in *United States* v. *Barnett, supra,* 376 U.S. at 728, which focused on the close correlation between the petty nature of criminal contempts at the time the Constitution was written and the trivial penalties generally imposed for such contempts. Directing his attention to those instances, Justice Goldberg concluded (*id.* at 759) "that contempts which are punishable as crimes must be tried by a jury". We do not construe this to mean, however, that the only test for determining whether a contempt proceeding is equivalent to a criminal prosecution for purposes of the Sixth Amendment is to ask: how is the contempt punishable? Where, as here, the alleged act of contempt itself constitutes a serious felony under state law, then we do not read the *Barnett* dissent to deny the right to trial by jury, even if the maximum punishment which could be imposed is relatively minor.

contempt charge.[28] But, we submit the nature of the offense should suffice to mark the procedure "criminal", for jury trial purposes, regardless of the amount of punishment authorized or imposed.

Our inquiry here is essentially similar to that of determining "whether a given offense is to be classified as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury." *District of Columbia* v. *Colts, supra,* 282 U.S. at 73.

In *Colts,* as here, the offense charged (reckless driving) was not merely *malum prohibitum,* but in its very nature *malum in se*—an indictable offense at common-law. Because of this fact the Supreme Court held that the defendant had a constitutional right to a jury trial, even though the maximum punishment he faced was 30 days' imprisonment.

The primary reliance which the Court has placed on the nature of the offense rather than merely the possible penalty which could be imposed upon the defendant is forcefully illustrated in the comparison between *Callan* v. *Wilson* (127 U.S. 540) and *District of Columbia* v. *Clawans* (300 U.S. 617) (1937). In *Callan,* the Court held that the right to trial by jury attaches to a defendant charged with a crime of conspiracy because that was considered to be a grave offense, even though only punishable by a maximum of 30 days' imprisonment; in *Clawans,* by contrast, the Court denied the right to a jury trial because the offense of

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[28] In *Bloom* v. *People of Illinois,* an alternative argument is presented that jury trial is required in those instances where even if the contempt is in most respects petty and trivial and not a crime at common-law, the severity of the penalty imposed renders the proceeding comparable to a prosecution of a common-law crime. Cf. *Cheff* v. *U.S.; U.S.* v. *Barnett, supra,* 376 U.S. at 695, n. 12; *District of Columbia* v. *Clawans, supra,* 300 U.S. at 627. In view of the penalty imposed in this case, this alternative issue is not squarely presented here, and we have therefore refrained from discussing it at length.

selling second-hand goods without a license was deemed not sufficient to give it the character of a serious crime, even though the maximum punishment there was 90 days' imprisonment.

This same analytical approach is equally valid here. Stated otherwise, just as the question whether a defendant accused of crime is entitled to a jury trial depends primarily upon the nature of the offense where the potential sentence is small (*ibid*), so too, this same test should apply to criminal contempt proceedings. The logic of focusing attention on the offense charged, and not merely the potential punishment, seems irrefutable. Suppose, for example, a law was passed limiting to six months the maximum imprisonment if proven guilty of premeditated murder; in that circumstance, we are confident that any such accused person would not be held to have lost the cherished right to trial by jury merely because of the ceiling placed on potential imprisonment.

For those who would limit the focus of their inquiry to the relatively small number of days for which an individual is subject to imprisonment, we would urge that there are numerous other equally significant ramifications which flow from and reflect the serious societal consequences of being found guilty of criminal contempt. Thus, for example, a conviction for criminal contempt has been deemed to be tantamount to a conviction for a "crime" within the meaning of a government regulation barring certain military veterans from burial in Arlington National Cemetery. Significantly, in the course of this advisory ruling, the Attorney General stated: "Criminal contempt is regarded as a crime for most purposes . . ." *Cheff* v. *Schnackenberg, supra,* 384 U.S. at 385-386 (dissenting opinion). The Government has thus placed the contemnor in the totally untenable position of being treated as having committed a "crime" once *convicted* of criminal contempt *but* as not being tried for a crime—or entitled to a jury trial—in the contempt proceed-

ing itself! Practical realities of this kind buttress petitioners' contention that the fundamental right of trial by jury is and should have been a condition precedent to the instant jail sentence.[29]

This Court has recently reaffirmed its longstanding concern over the "possible abuse of the contempt power." *Harris* v. *United States*, 382 U.S. 162, 164 (1965). The need for a jury trial is especially compelling in contempts, as here, arising out of labor disputes; such disputes often become a *cause celebre* in the particular community involved. Emotion and passion may then supplant reason. And there can be little question but that certain judges could unwittingly succumb to the temptation of permitting a strongly anti-labor orientation of a given community to color their judgment in the contempt proceeding. For "[j]udges are not emotionally different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal." (Black, J. dissenting in *Green* v. *U.S., supra*, 356 U.S. at 198).

Further, the anomalous consequences of reaching any other conclusion here should not pass unnoted. The State Court, in the guise of exercising its contempt power, has, in effect, found the petitioners guilty of committing the serious felony of shooting into the home of a fellow human being with the intent to kill or inflict bodily harm. The State could have instituted a criminal procedure by indictment against petitioners under the Criminal Code of Tennessee. But it chose not to do so. If it had done so, the petitioners clearly would have been entitled to a jury trial. Indeed,

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[29] Note also in this connection the fact that the Seventh Amendment guarantees the right to trial by jury in civil actions where the value in controversy exceeds $20.00. See also *District of Columbia* v. *Clawans*, 300 U.S. 617, 633-634 (dissenting opinion).

under the Tennessee Constitution, this right attaches with respect to all criminal cases—misdemeanors and felonies alike—in which imprisonment, no matter how short, is an authorized sentence. *Willard* v. *State,* 174 Tenn. 645, 130 S.W. 2d 99 (1939). This further highlights the incongruity of the petitioners' situation—they are in effect being tried for a felony without the safeguard of a jury verdict, whereas even those persons charged with a misdemeanor in Tennessee have the right to demand a jury trial. So too, if this very same criminal contempt procedure had arisen in federal, rather than state court, petitioners would have been entitled to a jury trial. See 18 U.S.C. Secs. 369 and 402.

In sum, it is petitioners' claim that the accused in a criminal contempt proceeding is entitled to the benefit of a trial by jury as prescribed by the Constitution where, as here, without regard to the sentence which could be imposed, the contempt proceeding cannot be deemed the equivalent of the prosecution of a petty offense, because the nature of the offense alleged as contempt constitutes a serious felony under state or federal law. Cf. *Callan* v. *Wilson,* 127 U.S. 540 (1888), *District of Columbia* v. *Colts* 282 U.S. 63 (1930).

B. ***The Sixth Amendment's Jury Trial Guarantee Is Applicable to State Court Proceedings By Virtue of the Fourteenth Amendment.***

We have shown above that the instant contempt proceeding was the equivalent of a criminal prosecution. Trial by jury in criminal prosecutions is one of the fundamental rights guaranteed by the Sixth Amendment to the Constitution. Because the right to trial by jury is a basic safeguard of liberty, immune from federal abridgment, we show below that it is equally protected from state invasion by the due process clause of the Fourteenth Amendment.

This Court has not yet decided whether the Sixth Amendment's guarantee of the right to jury trial is equally

applicable to state criminal proceedings.[36] In a series of recent decisions, however, the Court has held that every other guarantee contained in the Sixth Amendment is obligatory upon the states by virtue of the Fourteenth Amendment. Thus, in the landmark *Gideon* v. *Wainwright*, decision, 372 U.S. 335 (1963), the Court held that a defendant in a state criminal proceeding for a non-capital offense was entitled to a court appointed attorney, since the Sixth Amendment's guarantee of "assistance of counsel" in all criminal prosecutions is such a fundamental safeguard that it is applicable to the states. So too, in *Pointer* v. *Texas*, 380 U.S. 400 (1965), the Court held that the Sixth Amendment's right of an accused in a criminal proceeding to confront the witnesses against him is likewise a fundamental right made obligatory on the states by the Fourteenth Amendment (*id.* at 403). See also, *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Irwin* v. *Dowd*, 366 U.S. 717 (1961) (impartial jury); *Washington* v. *Texas*, 388 U.S. 14 (1967) (compulsory process).

These Sixth Amendment cases aptly reflect the overall trend of the Court's recent decisions holding that fundamental rights enumerated in other portions of the Bill of Rights are likewise immune from state invasion by the Fourteenth Amendment. See, for example, *Ker* v. *California*, 374 U.S. 23 (1963) (Fourth Amendment standard of legality for searches without a warrant); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusion of illegally seized evidence); *Malloy* v. *Hogan*, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); *Aguilar* v. *Texas*, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment protec-

[36] The Court granted certiorari in *Duncan* v. *Louisiana*, Case No. 410, October Term 1967, to consider this precise issue in a criminal case, along with *Bloom* and the instant case, which present the issue in a criminal contempt setting.

tion against cruel and unusual punishment).[31]

The breadth of the Court's language in *Pointer* is particularly significant. Directing its attention to the claim that the Sixth Amendment's right to confrontation does not apply to state courts because the Sixth Amendment as a whole is inapplicable, the Court stated (*id.* at 406): ". . . of course, since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts . . . In the light of *Gideon, Malloy* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."

This much, therefore, seems clear from the foregoing: at least with respect to those guarantees contained in the Bill of Rights which the Court considers "fundamental rights" the States will be bound by the provisions of the first eight amendments by virtue of the Fourteenth Amendment. Where such fundamental rights are concerned, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only 'a watered-down, subjective version of the individual guarantees of the Bill of Rights'." (*Malloy v. Hogan,* 378 U.S. 1, 10-11).

There can be no dispute but that the right to trial by jury in "criminal" cases stands on equal footing with, and is just as fundamental as, the right to confront witnesses, the right to counsel, and the right to an impartial jury. Indeed, each of those mentioned rights constitute but integral parts of the overall right to a fair trial by jury—the precise right involved here. The importance which our founding fathers attached to this right is self-evident. For they

[31] See also the cases cited in *Gideon, supra,* 372 U.S. at 341, n. 4, holding that the First Amendment's freedoms of speech, press, religion, assembly, association and petition are fundamental guarantees immune from state invasion by the Fourteenth Amendment.

viewed "trial by jury of laymen and no less . . . as the birthright of free men" (Black, J., dissenting in *Green* v. *U.S.*, *supra*, 356 U.S. at 209). Accordingly, the right to trial by jury provided by the Sixth Amendment is applicable here.

Moreover, totally apart from any consideration whether the Sixth Amendment has been incorporated into the Fourteenth Amendment by the "process of absorption"[32] the right to a trial by jury in the instant circumstances is "implicit in the concept of ordered liberty" and thus protected by the due process provision of the Fourteenth Amendment. See, for example, Harlan, J., concurring in *Pointer* v. *Texas*, *supra*, 380 U.S. at 408-409.

[32] *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937).

CONCLUSION

For the foregoing reasons, petitioners submit that the decision of the Supreme Court of Tennessee should be reversed and the case should be remanded to State Court for a trial by jury in which its illegally seized evidence shall not be admissible.

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